Re Mohamad bin Hitam; ex p Am Finance Bhd (previously known as MBF Finance Bhd)

HIGH COURT (MELAKA) — BANKRUPTCY NO 29–617 OF 2004
LOW HOP BING J
30 NOVEMBER 2005

Bankruptcy — Notice — Application to oppose — Whether issue of identity of the judgment debtor not raised in summons in chambers and affidavit in support of application to dismiss bankruptcy notice can be considered — Rules of the High Court 1980 O 32 r 1, Form 62

This was an appeal filed by the judgment creditor (JC) against the decision of the registrar who had allowed with costs the judgment debtor's (JD's) application and dismissed the JC's bankruptcy notice against the JD by sustaining a preliminary objection raised for the JD that default judgment attached to the request for the issue of a bankruptcy notice had stated that the JD was 'Mohamad Hitam & Rakan T/A Syarikat Bersaudara' while the bankruptcy notice cited 'Mohamad bin Hitam' as the JD. The learned registrar in his grounds of decision found that the JD had not disputed the validity of the default judgment. However, he sustained the preliminary objection pertaining to the identity of the JD. The identity of the JD was not raised as a ground in JD's application or in his affidavit in support. The issue for determination in the appeal was whether the JD is entitled to raise or the registrar is required to consider the issue of the identity of the JD when the JD has not relied on it as a ground in his summons in chambers or in his affidavit in support.

Held, allowing judgement creditor's appeal with cost:

(1) The JD's application is regulated by O 32 r 1 of the Rules of the High Court 1980. Such an application must be made by way of summons in chambers in Form 62 which contains the words: 'The grounds of application are (state the ground)'. The above said required the grounds to be stated. Form 62 is analogous to the parties' pleadings by which the parties are bound. Parties were not at liberty to go beyond the grounds other than those stated in Form 62 (see para 17).

(2) The judge or registrar hearing an application in Form 62 is neither required nor entitled to travel beyond the specified grounds relied on by the parties, otherwise the issues will proliferate ad infinitum and chaos in litigation may prevail (see para 17).

(3) The issue of identity of the JD being not specified in Form 62 must not be seen to appear from nowhere, especially so when his own affidavit did categorically state that he was indeed the JD in the default judgment (see para 18).

(4) As the learned registrar had come to a specific finding that the JD had never disputed the validity of the default judgment, the bankruptcy notice should have been proceeded in accordance with the law and practice regulating bankruptcy proceedings (see para 19).

Ini merupakan satu rayuan yang difailkan oleh pemiutang penghakiman terhadap keputusan pendaftar yang membenarkan kos permohonan penghutang penghakiman dan menolak notis kebankrapan pemiutang penghakiman terhadap penghutang penghakiman dengan mengekalkan bantahan awal ('preliminary objection') yang ditimbulkan bagi penghutang penghakiman bahawa kemungkiran membayar terhadap permintaan untuk pengeluaran kebankrapan notis telah menyatakan bahawa penghutang penghakiman adalah Mohamad Hitam & Rakan T/A Syarikat Bersaudara manakala notis kebankrapan menyatakan nama Mohamad bin Hitam sebagai penghutang penghakiman. Pendaftar yang bijaksana dalam alasan pemghakimannya mendapati bahawa penghutang penghakiman tidak mempertikaikan kesahan kemungkiran membayar. Walaubagaimanapun, pendaftar yang bijaksana telah mengekalkan bantahan awal berkenaan identiti penghutang penghakiman. Identiti penghutang penghakiman tidak ditimbulkan sebagai alasan dalam permohonan penghutang penghakiman ataupun dalam afidavit sokongan.

Diputuskan, membenarkan rayuan pemiutang penghakiman dengan kos:

(1) Permohonan penghutang penghakiman dikawal oleh A 32 k 1 Kaedah-kaedah Mahkamah Tinggi 1980. Permohonan tersebut mesti dibuat melalui saman dalam kamar dalam Borang 62 yang mengandungi perkataan: 'Alasan-alasan permohonan adalah (catatkan alasan).' Penyataan di atas memerlukan alasan-alasan dicatatkan. Borang 62 seakan-akan serupa dengan pliding parti-parti dimana parti-parti adalah terikat. Parti-parti tidak digalakkan mengatasi alasan-alasan selain daripada yang tercatat dalam Borang 62 (lihat perenggan 17).

(2) Hakim ataupun pendaftar membicarakan satu permohonan dalam Borang 62 adalah sama ada tidak diperlukan atau diminta mengembara mengatasi alasan-alasan spesifik yang diharapkan oleh parti-parti, jikalau tidak isu-isu boleh berkembang biak dan kesusahan dalam litigasi akan menjadi bertambah giat (lihat perenggan 17).

(3) Isu identiti penghutang penghakiman yang tidak dikhususkan dalam Borang 62 mesti tidak keluar dari mana-mana terutamanya apabila afidavitnya yang tersendiri menyatakan bahawa penghutang penghakiman memang merupakan penghutang penghakiman di dalam kemungkiran membayar (lihat perenggan 18).

(4) Sebagaimana penghutang penghakiman telah sampai kepada dapatan yang khusus bahawa penghutang penghakiman tidak pernah mempertikaikan kesahan kemungkiran membayar, kebankrapan notis sepatutnya diteruskan mengikut undang-undang dan praktis mengawal prosiding kebankrapan (lihat perenggan 19).]

Notes

For cases on bankruptcy, see 1 *Mallal's Digest* (4th Ed, 2005 Reissue) paras 2566–2570.

Legislation referred to

Rules of the High Court 1980 O 32 r 1

Ravinathan Muthiah (Ravi Muthiah & Co) for the judgment debtor.
TT Leong (Tunku Amiruddin & K K Chew) for the judgment creditor.

Low Hop Bing J:

APPEAL

[1] This is an appeal in encl (13) filed by the judgment creditor (JC) against the decision of the learned registrar who had on 12 May 2005 allowed with costs the judgment debtor's (JD's) application in encl (4) and dismissed, inter alia, the JC's bankruptcy notice against the JD.

FACTUAL BACKGROUND

[2] JD's application in encl (4) was supported by his affidavit in encl (3) in which the JD averred that on 26 October 2004, he had been served, inter alia, with a bankruptcy notice dated 30 August 2004 ('the bankruptcy notice') which was based on a judgment in default ('the default judgment') obtained by the JC against the JD on 14 August 1997 in Melaka sessions court summons No 52–297 of 1997 ('the summons').

[3] On 27 October 2004, JD instructed his solicitors to conduct a file search in the summons. The solicitors had obtained a copy of the summons and the affidavit of service (collectively 'the two documents').

[4] Upon a perusal of the two documents, the JD was surprised that they had been served on him as he was unaware of the two documents.

[5] JD's affidavit then referred to the judgment obtained against the guarantor. As the bankruptcy notice does not concern the guarantor, I am of the view that the averments relating to the guarantor are not relevant to the instant appeal.

[6] JD also alleged that the bankruptcy notice against him was for the sum of RM105,616.55 based on an interest of 14.10% pa from the date of the default judgment to 13 August 2003.

[7] He averred that the bankruptcy notice is wrong in law and ought to be set aside.

[8] The learned registrar's grounds of decision show that a preliminary objection was raised for the JD in that the default judgment attached to the request for the issue

of a bankruptcy notice had stated that the JD was 'Mohamad Hitam & Rakan T/A Syarikat Bersaudara' while the bankruptcy notice cited 'Mohamad bin Hitam' as the JD.

[9] The learned registrar in his grounds of decision found that the JD had not disputed the validity of the default judgment. However, he sustained the preliminary objection pertaining to the identity of the JD. As a result, he set aside the bankruptcy notice.

[10] The identity of the JD was not raised as a ground in his application in encl (4) or in his affidavit in support in encl (3).

IDENTITY OF JD

[11] Mr Ravinathan Muthiah, learned counsel for the JD at p 1 of his written submission, brought to my attention as follows:

> Isu berkenaan Pembangkitan Bantahan Awal
>
> Di sini ingin kami memberitahu mahkamah bahawa isu ini tidak pernah dibangkit atau dihujah semasa perbicaraan di hadapan Pendaftar…..

[My translation:

> Issue Concerning the Raising of Preliminary Objection
>
> We wish to hereby inform the court that this issue was never raised or submitted at the time of hearing before the Registrar,…."""""]

[12] However, he now submitted that this is a critical issue concerning the identity of the JD and that a determination thereon would dispose of the bankruptcy proceedings herein and save the time of the court.

[13] JC's learned counsel Miss TT Leong relied on the JD's affidavit in support in encl (3) wherein the JD has never denied that he was the JD in the summons.

[14] From the above submissions, I am of the view that the issue for determination in this appeal revolves around an important and fundamental point of practice and procedure which may be stated as follows:

> Whether the JD is entitled to raise or the registrar is required to consider the issue of identity of the JD when the JD had not relied on it as a ground in his summons in chambers or in his affidavit in support?

[15] The short answer to this issue is to be found in para 1 of the JD's own affidavit wherein he stated categorically that he is the JD in these bankruptcy proceedings. Nowhere in his affidavit did he ever aver to the contrary.

[16] In my view, the JD's application is regulated by O 32 r l of the Rules of the High Court 1980. Such an application must be made by way of summons in chambers in Form 62 which contains the following words:

The grounds of application are (state the ground)

[17] The abovesaid words are included in Form 62 for a specific purpose. They specifically require the grounds to be stated. Form 62 is analogous to the parties' pleadings by which the parties are bound. Parties are not at liberty to go beyond the grounds other than those stated in Form 62. The judge or registrar hearing an application in Form 62 is neither required nor entitled to travel beyond the specified grounds relied on by the parties, otherwise the issues will proliferate ad infinitum and chaos in litigation may prevail.

[18] The issue of identity of the JD being not specified in Form 62 must not be seen to appear from nowhere, especially so when his own affidavit did categorically state that he was indeed the JD in the default judgment.

[19] As the learned registrar has come to a specific finding that the JD has never disputed the validity of the default judgment, the bankruptcy notice should have been proceeded with in accordance with the law and practice regulating bankruptcy proceedings.

CONCLUSION

[20] The answer to the abovestated issue is therefore in the negative. I hold that the learned registrar has erred in dismissing the bankruptcy notice. I allow this appeal, set aside the order of the learned registrar, and reinstate the bankruptcy notice, for it to be proceeded with as aforesaid to its logical conclusion. Costs of this appeal to the JC.

Judgment creditor's appeal allowed with costs.

Reported by AG Kalidas